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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC., *Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF ON BEHALF OF THE PORT OF NEW YORK AUTHORITY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT'S POSITION

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BOYCE MOTOR LINES, INC.,
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BRIEF ON BEHALF OF THE PORT OF NEW YORK AUTHORITY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT'S POSITION

Statement of the Case

On May 13, 1949 a shipment of carbon bisulphide which was being transported in one of appellant's vehicles exploded in the Holland Tunnel. The explosion resulted in the injuries to sixty persons. In addition, over $600,000 in property damage was occasioned.

The First Count of the present Indictment arises out of the aforementioned holocaust. It charges appellant with violating a regulation of the Interstate Commerce Commission, 49 C. F. R. 238, 1949 Ed. Section 197.1(b), issued pursuant to statutory regulation contained in 18 U. S. C. 838, 62 Stat. 739. The regulation requires drivers of vehicles transporting explosives or other inflammable substances to avoid by prearrangement of routes driving into

congested thoroughfares or tunnels "so far as practicable and where feasible".

Counts Three and Five of the Indictment also charge appellant with violating the same regulation by transporting shipments of carbon bisulphide through the tunnel on two previous occasions. Counts Two, Four and Six are not here in issue.

The District Court granted appellant's motion to dismiss Counts One, Three and Five on the ground that the Interstate Commerce Commission regulation involved was invalid because its use of the terms "practicable" and "feasible" afforded no ascertainable standard of guilt, and also on the ground that said counts were ambiguous.

Upon appeal by the United States to the Court of Appeals for the Third Circuit, the dismissal of Counts One, Three and Five were reversed, the Court finding as a matter of law that (188 F. 2d 889, 891):

> "To one who knows of his duty under the regulation the imposition of a duty to arrange to use that route which avoids congested * * * tunnels * * * so far as practicable and where feasible, is not to put him to a choice so uncertain as to violate the constitution."

The Court held that prior decisions indicated that the term (p. 891):

> "'so far as practicable' means so far as commercially practicable from the standpoint of those engaged in the trucking business, and 'where feasible' undoubtedly means where physically feasible from the standpoint of the operation of the motor vehicle involved."

Accordingly the question here raised is whether the Interstate Commerce Commission regulation in question promulgated pursuant to specific Congressional authorization meets the constitutional requirement that a criminal statute or regulation afford an ascertainable standard of guilt.

The Port of New York Authority As *Amicus Curiae*

The Port of New York Authority files this *amicus curiae* brief pursuant to Rule 27 (d) of the Revised Rules of this Court. This rule provides that consent to file a brief of an *amicus curiae* need not be had when the brief is presented on behalf of a political subdivision of a State sponsored by its authorized law officer. The Port of New York Authority is a governmental agency of the States of New York and New Jersey having been created by Compact between them (Ch. 154, Laws of N. Y., 1921 and Ch. 151, Laws of N. J., 1921) consented to by Congress (Pub. Res. 17, 67th Cong. 1st Session, 1921). That the Port of New York Authority is a political subdivision of two States does not make it any the less a political subdivision of one State. See *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (1944) cert. den. 323 U. S. 792 (1945).

The Court below recognized the Port of New York Authority's concern in the outcome of this case by granting its motion for leave to file an *amicus curiae* brief (Record, p. 21). The Commissioners of The Port of New York Authority have by resolution dated November 9, 1951 authorized the filing by the Port Authority's General Counsel, its authorized law officer, of a brief in support of respondent's position before this Court.

The Port Authority is vitally interested in this proceeding. The explosion which forms the basis of Count One of the Indictment occurred in the Holland Tunnel, one of the Port Authority's under-water vehicular crossings. It is only by the sheerest good fortune that many lives were not lost and only sixty persons were injured. A repetition of the explosion might cause wholesale loss of life, injury to many more persons not to mention much greater property damage. In addition to the personal injuries occasioned in the May 13th explosion the tunnel was completely closed for five hours and one of its two tubes re-

mained closed for fifty-six hours and then required nightly closing for 103 days until the necessary repairs could be made. This not only inconvenienced numerous Port Authority patrons but diverted a large segment of interstate commerce into the Port Authority's Lincoln Tunnel, two miles further north, thereby increasing traffic congestion in midtown Manhattan.

Accordingly, the Port Authority as owner and operator of tunnels connecting the States of New York and New Jersey, is vitally concerned that no lives be lost or persons again be injured in its facilities. The Port Authority is interested in making certain that its interstate vehicular crossings receive the fullest possible protection from the hazards resulting from the transportation of dangerous cargoes. That such concern is not misplaced, and is, in fact, essential to the continued operation of Port Authority facilities, is most dramatically evidenced by the facts of the present case.

Port Authority tunnels carry a continuous flow of vehicles throughout the day and night. The density of the traffic and the confined nature of the tunnel roadways make it evident that in case of explosion, lives will be destroyed and severe bodily injury inflicted, and, of course, damage and destruction to the facilities and travelling vehicles will result. For that reason the Port Authority's own rules and regulations forbid truck-loads of inflammables and explosives from entering its tunnels. The necessity of such substances crossing the Hudson River is recognized, however, and their transportation over Port Authority bridges is permitted, with certain precautionary measures in the case of explosives. And, for the downtown New York area which the Port Authority serves only by tunnels, the Delaware, Lackawanna & Western Railroad operates a special ferry service for inflammables and explosives from Hoboken, N. J. to New York City under a tariff on file with the Interstate Commerce Commission.

It is apparent that if the regulation in question is not observed and respected in the future catastrophes similar

to that of May 13, 1949 will ensue. The Port Authority fears lest the deterrent effect of the I. C. C. regulation be removed from the arsenal of those whose responsibility it is to see that interstate commerce moves securely and safely, and with a minimum of threat to life and limb of the innocent by-standing public.

In the event of hostilities, destruction of the Port Authority's tunnels would be a prime military objective for the nation's enemies, well worth the loss of an entire fleet of aircraft to the enemy. We should not, by rejecting the present regulation, in effect invite our own citizens to serve the enemy by exposing these tunnels to daily destruction by explosives and inflammables.

The Port Authority therefore appears in this appeal by the motor carrier which caused the accident to demonstrate that the Interstate Commerce Commission regulation in question adequately meets the constitutional requirement of certainty so as to subject those responsible for the catastrophe to the penalties prescribed by law and deter a recurrence of such calamities. The Port Authority contends that the regulation considered in the light of the objective to be achieved and the subject matter being regulated, affords a standard of guilt sufficiently certain to meet the requirements of the Fifth and Sixth Amendments.

Summary of Argument

(1) In *Sproles* v. *Binford*, 286 U. S. 374 (1932) this Court considered the identical challenge here made to the identical test of "practicability" of the selection of highway routes in almost the identical context here involved and ruled that use of such a test affords adequate certainty and an ascertainable standard of guilt within the requirements of the Constitution. This decision is a controlling precedent for the instant case.

(2) "Practicability" as a test of permitted selection of routes in the regulation promulgated by the Interstate Com-

merce Commission is not too vague and indefinite to form the basis for a criminal statute, since it has a well accepted meaning by virtue of uniform federal court decisions.

(3) Even if individuals might differ in borderline cases as to whether specific conduct was or was not "practicable" within the meaning of the regulation, it is well settled that the possibility of such differences does not make the regulation invalid for vagueness and indefiniteness.

(4) In any event, the regulation is constitutional when applied to the extreme facts of the present situation. The borderline offender may be heard to argue that he was not informed in advance as to the nature of the offense. But where the act charged is a flagrant and extreme violation of the prohibition, adopting any possible meaning of the prohibiting language that is at all reasonable, then there is no constitutional vagueness or indefiniteness as applied to the specific case because there cannot possibly be a failure of adequate warning. Appellant must have known the extreme danger which is occasioned by carrying a shipment of carbon bisulphide into the congested Holland Tunnel at rush hour. Appellant failed to avoid the Tunnel by prearranging its route as required by the regulation and appellant must have known that in any sense of the word it was practicable and feasible to avoid the Tunnel and to use the other alternatives available like the special explosives ferry operated by the Delaware, Lackawanna & Western Railroad or the George Washington Bridge.

(5) Furthermore, the regulation is entitled to the well established presumption of constitutionality—for to do otherwise would unnecessarily thwart a clear and important Congressional purpose. The regulation can and should be interpreted so as to render it constitutional.

I

This Court has upheld the validity of the language here challenged in a context virtually identical to that in question.

In view of *Sproles* v. *Binford*, 286 U. S. 374 (1932) it is not an open question whether the test used in the instant regulation of the Interstate Commerce Commission meets the requirements which the Constitution imposes on a criminal statute. Speaking of this decision, the Court of Appeals for the Third Circuit stated in this case below (188 F. 2d 889, 891):

> "The conclusion which we have reached (that the regulation is constitutional) finds full support in *Sproles* v. *Binford*, 1932, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167, in which case the Supreme Court upheld a Texas statute, also dealing with safety regulations for motor vehicle transportation, which set up a standard of practicability somewhat analogous to that involved in the present regulation."

The question in the *Sproles* case was as to the constitutionality of certain Texas penal provisions prohibiting the operation on any highway of any vehicle exceeding stated limitations of size and weight except (p. 383):

> "when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination, * * *"

Objection was made on the ground that this provision, by use of the terms "nearest practicable common carrier receiving or loading point" and "shortest practicable route to destination" (p. 393):

> "is so uncertain that it affords no standard of conduct that it is possible to know."

The reasons why this Court, speaking unanimously could not agree with that view apply equally well to the arguments advanced against the regulation in the present case. The Court said (p. 393):

> "'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it."

There appears to be no distinction which would make the holding in the *Sproles* decision inapplicable to the instant case. Like the present regulation the statute at issue in the *Sproles* case, involved (1) safety regulations covering motor vehicle transportation adopted to minimize hazards and dangers to the public from such transportation; (2) establishment of a standard of "practicability" in selecting highway routes; (3) was challenged on the ground that the regulation formulated in terms of a standard of "practicability" was too vague to form the basis of a criminal proceeding; and (4) the alleged indefiniteness was not in the regulation's prohibition, which was quite definite, but in the regulation's exception framed in terms of practicability.

Appellant's attempted distinction says that "the expression 'shortest practicable route to destination' requires no more than the exercise of ordinary judgment and practical experience" (appellant's brief, p. 18). And, we submit, the regulation at issue identically requires no more than the exercise of ordinary judgment and practical experience in prearranging routes to minimize the danger

to the public from transporting hazardous loads through congested areas. Selecting the Holland Tunnel was the surest way of maximizing the danger and obviously violated a clear prohibition.

II

The words "practicable" and "feasible" in the instant regulation have a well accepted meaning defined in Court decisions.

Appellant's contention that the language of the Interstate Commerce Commission regulation in question is ambiguous is not legally tenable. Language in criminal statutes identical to that of the present regulation applying to the selection of routes of transporting dangerous cargo has been interpreted in several court decisions. Thus, in addition to its clear meaning as a matter of common usage and understanding, the language of the regulation in question has a well accepted meaning by virtue of such judicial interpretation—a meaning which affords an ascertainable standard of guilt. As construed by the Courts, "practicable" in a context such as that of the regulation means "commercially practicable".

The statute considered by the Court in *The Benton*, 51 F. 302 (1892) prohibited the transportation of numerous inflammable articles on passenger vessels, including refined petroleum. However, under certain conditions the statute permitted the transportation of refined petroleum upon such steamers (p. 302):

> "where there is no other practicable mode of transporting it"

Interpreting the word "practicable" as used in the statute, the Court said (p. 303):

> "The word 'practicable,' as used in the statute, (section 4472,) has been held to mean 'commercially

practicable,' as distinguished from 'physically or mechanically practicable,' and that seems to be a very reasonable, if not a necessary, interpretation of the statute. *U. S.* v. *Wise* and *U. S.* v. *Thornburg*, 6 Fed. Rep. 41, and 7 Fed. Rep. 190."

In discussing the facts of this case the Court stated (p. 303):

"It appears from the agreed statement that there was a practicable mode of transporting the coal oil in question from St. Louis to Osage City and Bonnett's Mills otherwise than by steamer. It might have been carried by rail between those points for about the same price charged by the steamer. On the other hand, it appears that there was no practicable mode of transporting it from Osage City and Bonnett's Mills to the points further up the Osage river to which it was destined than by steamer. Does this latter fact render the transportation of the commodity from St. Louis to Osage City and Bonnett's Mills by a passenger steamer lawful? The court decides this question in the negative. It was not commercially impracticable, as the agreed statement shows, to ship the oil to its ultimate destination partly by rail and partly by water. It had to be unloaded, in any event, at Osage City and Bonnett's Mills, and to be thence forwarded to its destination by another steamer, as the steamers that ply on the Missouri river cannot ordinarily ascend the Osage; and the total cost of transportation over the whole route, if carried from St. Louis to the latter place by rail, would not, as it seems, have been materially greater than if carried for the whole distance by water. If it be conceded that inflammable commodities, like coal oil, can be lawfully carried on passenger steamers merely because the ultimate point of destination is a short distance off the line of a railroad, then it would frequently happen that such commodities would be carried for long distances by water, thereby enhancing the dangers of travel and defeating the beneficient purposes of the act."

On the basis of those facts the Court concluded (p. 304):

> "The court is accordingly of the opinion that when, as in the present case, it is commercially practicable to transport such a commodity as coal oil by rail for a considerable portion of the distance to be covered, and thence by water to its ultimate destination, that method of transportation is the only one that can be lawfully employed, even though it is possible to transport it for the entire distance by water, and not possible to transport it the entire distance by rail. Entertaining these views, judgment will be entered for the government on the second count, and also on the first count, of the information."

The word "practicable" as used in the statute interpreted by the Court in the *Benton* case had also been construed in *United States* v. *Wise*, 7 F. 190 (1881), as follows (p. 192):

> "* * * The question turns upon the construction of the statute—the meaning of the word 'practicable,' as used in section 4472, Rev. St. In one sense it was practicable to send the oil by rail in each case,—that is, in a mechanical sense; but it is my opinion that the word must be accepted in a commercial sense. The statute in question is a regulation of commerce, and whether a mode of transportation between any two points is practicable, must be decided with reference to the commerce between those points. If the rates charged for transportation by rail would amount to a prohibition of the traffic, it would not be a practicable mode of transportation within the meaning of this statute. * * * It must be held in these cases that passenger vessels are prohibited from carrying petroleum when it is practicable, in a business sense, to employ another mode of transportation; but if the effect of the prohibition would be to destroy such traffic it may be carried upon passenger vessels, subject to the cautionary provisions of the statute."

The federal statute involved in the *Benton* and *Wise* cases is closely analogous to the regulation promulgated by

the Interstate Commerce Commission. Each is designed to provide for the safe transportation of a dangerous cargo and each is phrased in terms of practicability. The courts in those cases relied upon apparent legislative intent in construing "practicable" to mean "commercially practicable". These cases have a dual significance here. In the first place, they furnish a long-standing, judicially approved, clear and definite meaning to the term "practicable" here challenged as vague and indefinite. As such they invoke the rule of *People* v. *Grogan*, 260 N. Y. 138, 145, 183 N. E. 273 (1932) that (p. 145):

> "the offense of reckless driving is sufficiently definite, *because of the meaning heretofore given* to 'reckless,' to make this portion of the section constitutional." (Emphasis ours)

Not only do these cases supply a long standing and judicially sanctioned meaning to the term "practicable" but they also are significant because penal provisions couched in terms of practicability were there enforced. These cases were not civil actions at common law or proceedings in equity but like the present case were criminal prosecutions.

In attempting to distinguish these cases appellant concedes (appellant's brief, p. 18) that the regulation in question would be valid if it "had provided that inflammables could not be transported through a tunnel unless there was no other practicable way of the cargo reaching its destination". Yet any reasonable interpretation of the regulation must give it exactly that meaning. A direction to avoid tunnels so far as practicable and where feasible is nothing more nor less than a prohibition to avoid tunnels unless no other practicable way exists. If that degree of interpretation would be required to make the regulation constitutional, then, as will be shown in Point V, the normal rules of construction would require the interpretation to be made. Here, however, no ambiguity exists which requires any interpretation and the regulation has exactly the meaning which appellant concedes would establish its validity.

The Court knows full well that many cases contain apt formulations of the general principle that criminal statutes must be definite enough to afford an ascertainable standard of guilt—cases which have both upheld and condemned the constitutionality of the particular statute or regulation attacked. The Court does not receive too much assistance nor is there much precedent value in a group of quotations, such as appellant offers, announcing the general principle in cases involving statutory language and factual situations with no similarity to the language of the present regulation and the facts of the offense charged.

Especially is this true when there exists, as in the present case, decisions closely in point both as to the constitutionality and interpretation of language making the selection of highway routes dependent upon a test of practicability and feasibility. Accordingly, because of the relevance of the *Sproles*, *Benton* and *Wise* decisions, no point can be served in distinguishing at length the cases cited by appellant in its attempt to invoke precedent in its attack on the present regulation.

For example, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921) (appellant's brief, p. 6) involved the validity of a statute making it unlawful to charge an unjust or unreasonable rate or charge for necessaries; *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926) (appellant's brief, p. 6), concerned the validity of a statute requiring a contractor to pay employees "not less than the current rate of per diem wages in a locality where the work is performed"; *Winters* v. *New York*, 333 U. S. 507 (1948) (appellant's brief, p. 7), had to do with the validity of a statute making it an offense to distribute or publish publications "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime"; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927) (appellant's brief, p. 14) concerned the validity of a statute which prohibited combinations in restraint of trade with certain exceptions; *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946) (appellant's brief, p. 7) *upheld* the validity of a maximum price regu-

lation; and *United States* v. *Capitol Traction Co.*, 34 App. D. C. 592 (1910) (appellant's brief, p. 16), concerned the adequacy of street railway service. No matter how many such cases can be marshalled stating the rule and instancing both constitutional and unconstitutional statutes and regulations, they offer no precedent and shed little light on the question of the validity of a regulation requiring a selection of practicable routes for the transportation of dangerous commodities. The only cases on that point support the validity of the present regulation.

III

The possibility that individuals might differ as to whether specific conduct is practicable does not make the regulation invalid.

Appellant seems impressed by the observation that different individuals might reach different conclusions as to what constituted a practicable route under the regulation. That individuals might differ or that juries themselves on the same factual situation might reach different conclusions is not enough to warrant declaring a regulation invalid for failure to establish an ascertainable standard of guilt. This Court has on frequent occasions declared that marginal cases will exist as respects most criminal statutes, but that criminal statutes are not thereby rendered invalid.

In *Nash* v. *United States*, 229 U. S. 373 (1913), the Court considered a criminal indictment under the Sherman Anti-Trust Act. Objection to the criminal operation of the statute was raised by defendant on the ground that the crime defined by the statute contained in its definition an element of degree as to which estimates might differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. In replying to this objection, Mr. Justice Holmes stated (p. 377):

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury

subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' * * * 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.'"

The same point was more recently made in *United States* v. *Petrillo*, 332 U. S. 1 (1947), where the constitutionality of a federal statute declaring it unlawful to use force to coerce, compel or constrain a licensee of the Federal Communications Commission to employ or agree to employ, "any person or persons in excess of the number of employees needed by such licensee to perform actual services" was at issue. Punishment upon conviction was by imprisonment for not more than one year or by fine of not more than $5,000 or both.

In sustaining the validity of the section in question, Mr. Justice Black, writing for the Court, declared (p. 7):

"Clearer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be."

To this Court (p. 7):

> "The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. * * * it would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees."

As applicable to the present case as to the *Petrillo* decision is Mr. Justice Black's statement that (p. 7):

> "The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

Justice Holmes wrote for this Court in *United States* v. *Wurzbach*, 280 U. S. 396 (1930), when the constitutionality of a federal statute making it unlawful for federal officers or employees to solicit money "for any political purpose whatever" from any other federal officer or employee was upheld. Objection was to the definiteness of the phrase "any political purpose". In rejecting this objection, Justice Holmes remarked (p. 399):

> "But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides.

> The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

Also in point is *United States* v. *Ragen*, 314 U. S. 513 (1942). This case involved the constitutionality of the Revenue Act of 1932 which provided that any person who wilfully attempted to evade any tax imposed by the Act is guilty of a felony. The Circuit Court of Appeals held a portion of the Act invalid because as applied it (118 F. 2d 128, 139):

> "would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void."

However, this Court unanimously held to the contrary, pointing out (p. 522):

> "Determination of allowable deductions by reference to a standard of 'reasonableness' is not unusual under federal income tax laws."

Furthermore, in language equally applicable to the present case, this Court stated (p. 523):

> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

This phase of the opinion was concluded with the following observations (p. 524):

> "A finding of unconstitutional uncertainty in this section of the act as applied here would be a negation of experience and common sense.
>
> "On no construction can the statutory provisions here involved become a trap for those who act in

good faith. A mind intent upon willful evasion is inconsistent with surprised innocence."

In *People* v. *Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931), ief Judge Cardozo for The New York Court of Appeals sidered the constitutionality of a penal law punishing ectors of monied corporations who participated in a udulent insolvency of such corporations. The statute vided that the insolvency of a monied corporation was med fraudulent unless its affairs appeared upon investi- ion "to have been administered fairly, legally and with same care and diligence that agents receiving a com- sation for their services are bound, by law, to observe." wrote (p. 470):

> "The act is not shorn of certainty of meaning by its reference to a standard of customary diligence. The power of the Legislature to make it a crime for banking officers to be so neglectful of their duties as to involve their banks in ruin is hardly to be doubted. The power existing, one is at a loss to imagine how the prohibited omissions could be more accurately stated, without a catalogue of particulars not susceptible of enumeration in advance of the event * * *"

IV

No possible doubt can exist as to application of the ulation's test to the instant case because here appellant lated the regulation's prohibition under circumstances which it clearly applied.

The authorities cited in the previous Point demonstrate t even if individuals differ in borderline cases as to ether specific conduct was or was not prohibited, the sibility of such difference does not make the statute ch prohibits the conduct invalid on the ground of vague- s and indefiniteness. This rule of law goes far beyond actual necessities of the present case which is not a

derline one but one of extreme disregard of the regu-
on's prohibition on any possible interpretation of the
uage which is reasonable. One doesn't require a
dard of tallness to be able to conclude that a seven foot
is tall. We submit that it must have been clear to
ellant because of the circumstances under which its
occurred that if the regulation in question was designed
o anything, it was designed to prohibit the doing of
tly that which appellant did. Accordingly, the regula-
cannot be said to be vague and indefinite as applied to
facts of this case.

It is clear beyond all doubt that what the regulation
ght to do was to minimize the danger of driving vehicles
aining explosives or inflammable substances by requir-
them to avoid tunnels and other especially vulnerable
congested places when alternative routes were physi-
available and commercially practicable. While in
ain borderline cases it might be possible to argue that
escape clause is indefinite and uncertain, such an
ument can hardly lie within this appellant's mouth.

The appellant asks several rhetorical questions (appel-
's brief, p. 12) to suggest a confusing multiplicity of
rnatives as to the route it should have selected to cross
Hudson River. Significantly enough, among the ques-
s posing alternative routes, there does not appear a
stion whether appellant should have taken the special
kawanna Ferry established with particular schedules
ricted to vehicles carrying explosives and inflammables
oss the Hudson River. Yet that alternative existed, as
er the Court knows judicially or, under the indictment,
d have been proved. And with the existence of such
ecial segregated explosives ferry route, obviously it was
cticable and feasible to avoid all other ferries and
lges, let alone tunnels, and no carrier of inflammables
xplosives could have conscientiously believed that any
r alternative was open to it in the area traversed by
appellant on May 13, 1949.

The fact is that appellant not only avoided the only open alternative to downtown New York which was practicable and feasible, but chose the alternative *most* calculated to produce devastation and catastrophe. Concededly it was not feasible or practicable to cross the Hudson River without using a bridge, tunnel or ferry. But so long as any bridge or ferry was available, let alone one specifically provided and restricted to dangerous cargoes, it was not only feasible and practicable to avoid such a tunnel as the Holland Tunnel, but a simple matter of ordinary humanity and common sense.

It takes no proof to know that an explosion in a congested under-river tunnel like the Holland Tunnel is likely to produce a holocaust. Under the circumstances which the Court knows judicially or which could be proved under the indictment, use of the Holland Tunnel particularly at the height of the morning rush hour, could never be considered an alternative open to a driver of a truckload of highly inflammable liquids and no such driver can possibly be heard to say that he didn't know that the Interstate Commerce Commission regulation intended to exclude such a cargo from such a tunnel.

The main if not sole reason why criminal statutes are required to be definite and certain is that elementary principles of justice require that one should know before he acts whether his contemplated conduct runs afoul of the penal law. Since appellant must have known under the extreme circumstances of the instant case that if the regulation was designed to prohibit anything it was the doing of exactly what appellant did, it had adequate warning in this case. Having such warning the accused cannot invoke the constitutional protection in this case.

Screws v. *United States*, 325 U. S. 91 (1945) is in point. In that case this Court upheld Section 20 of the Criminal Code against the same contention of vagueness, indefiniteness and uncertainty. This section provides that:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or

causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, • • • shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Six Justices voted to uphold this section on the ground hat as applied to the extreme facts in the case it was constitutional. The Court held that Screws was in no position o claim that the statute punished without warning an offense of which he was unaware.

The facts of the *Screws* case were as outrageous in its vay as the present appellant's reckless and flagrant disegard of the consequences of its acts are in this case. Screws, sheriff, with the aid of a policeman and a special leputy, arrested Hall, a United States citizen, on a warrant harging Hall with the theft of a tire. Enroute to the courtouse Sheriff Screws and his two accomplices commenced eating the handcuffed Hall with a black jack. They continued to beat him for almost half an hour after he had been nocked unconscious. He was then dragged through the ourthouse yard into the jail and left dying upon the floor.

The question raised by the *Screws* case was the same s that here under discussion, viz: whether the statute was oo vague and indefinite to provide an ascertainable standard f guilt when applied to a specific set of facts. This Court—ix Justices in substantial agreement as to the reasons—ejected the contention that the statute was unconstitutionally vague, indefinite and uncertain as applied to the acts of the *Screws* case on the ground that whatever are he rights secured by the Constitution—and in close cases his is a very difficult question—it is evident that one right ecured by the Constitution is the right not to be deprived of fe without a fair trial.

It was this right according to the prevailing Justices hat Sheriff Screws deprived Hall of, when he and his accomplices wilfully beat their prisoner to death. Thus Sec-

tion 20 of the Criminal Code was not indefinite, vague or uncertain when applied to the particular facts of the *Screws* case however vague it might be when applied to other facts. Similarly in the aggravated circumstances of the instant case whatever else the Interstate Commerce Commission regulation in question prohibited, it prohibited appellant from driving its vehicle through a crowded and vulnerable Tunnel at the peak hour of morning commuter congestion when other routes were available which in any sense of the word were practicable for appellant to use. As a result of appellant's knowing violation of this section, sixty persons were injured, and tremendous property damage occasioned. Even this does not tell the full story for the toll of the catastrophe was surprisingly though fortunately low. A recurrence could cause great loss of life and far greater loss of property. Whether the regulation in question might be held vague and indefinite in close cases it is certainly not indefinite as applied to an extreme case like the present one.

We recognize quite frankly that two of the present members of this Court were unable to concur with the majority in upholding the constitutionality of the statute challenged in the *Screws* case. The reasons which impelled their opinion do not, however, apply to the present case. The argument in this Point merely suggested additional reasons for upholding the regulation. The precedent value of the *Sproles* case remains. The clear meaning of the words in the present statute as words of ordinary usage as well as of judicial construction remains. And the doctrine remains that a statute is not invalid because of the possibility of individual differences of opinion as to whether specific conduct violates a prohibition. Furthermore, there is not in the present case the alternative recognized by the dissenting Justices in the *Screws* case—the acts there constituted manslaughter or murder under state law and were punishable as such. The Justices suggested that prosecution under the federal statute involved was an abnormal substitution of federal punishment for the normal state

process which would unbalance the relationships between state and nation. In the present case, however, we are in the field of regulation of interstate commerce in its most elementary sense. For Congress to seek to protect the free flow of that commerce from physical interference and to protect life and limb from the consequences of such commerce is the exercise of one of the most elementary powers delegated to the Federal Government in the Constitution. The philosophy of both the prevailing and dissenting Justices in the *Screws* case would call, we respectfully submit, for upholding the regulation and the indictment challenged herein.

If, as the Court held in the *Screws* case, the constitutionality of the challenged statute was aided because it only punished action "willfully" designed to deprive a person of his rights under the Constitution and laws of the United States (325 U. S. at p. 101) then we point out that in the present case the statute pursuant to which the Interstate Commerce Commission issued the regulation in question punishes only violations "knowingly" made. The word "knowingly" found in the instant statute performs the same function in the instant case that the word "willfully" played in the *Screws* case. See also *Omaechevarria* v. *Idaho*, 246 U. S. 343 (1918); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925).

It is essential to both the protection of life, the safety of interstate commerce and the prosperity and defense of the nation that the Interstate Commerce Commission have the sanction of the criminal code behind its safety regulations on transporting inflammables. The nature of the Port Authority's underwater crossings and the density of their traffic justifies, even necessitates, the strongest and most rigid precautionary measures. Flexible regulations based upon a rule of reason are the only type of regulation which are at once practicable enough to obviate the dangers described above and yet definite enough to afford an ascertainable standard of guilt. Just such a regulation is the one here attacked when applied to the facts detailed in Counts One, Three and Five of the Indictment.

V

The regulation is entitled to the well-established presumption of constitutionality—to do otherwise would unnecessarily thwart a clear and important congressional purpose. The regulation can and should be interpreted so as to render it constitutional.

In empowering the Interstate Commerce Commission to promulgate regulations, Congress was motivated by concern for safety in the transportation of hazardous cargo in interstate commerce. The regulation in question is predicated upon such an authorization and is designed to effectuate Congressional intent. As such it enjoys a presumption of constitutionality which appellant has not rebutted. *Boske* v. *Comingore*, 177 U. S. 459 (1900).

The issue there was the validity of a regulation promulgated by the Secretary of the Treasury pursuant to statutory authorization. A unanimous Court observed (p. 470):

> "In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under § 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

Not only is the regulation in question entitled to the normal presumption of constitutionality afforded statutes but it is also entitled to receive the benefits from the corollary of that presumption, namely that if two interpreta-

tions of the regulation are possible, one rendering it unconstitutional and the other upholding its constitutionality, the latter will invariably be chosen. For example, Mr. Justice Holmes in *United States* v. *Jin Fuey Moy*, 241 U. S. 394 (1916) observed when discussing the validity of a criminal indictment predicated upon the alleged violation of a federal statute (p. 401):

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

The Court has invariably favored that construction of legislation which supports its constitutionality. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936); *National Labor Relations Bd.* v. *Jones & L. Steel Corp.*, 301 U. S. 1, 30 (1937); *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351 (1937).

In the *Screws* case it was stated that this construction (p. 98)

> "is impelling here so that if at all possible § 20 may be allowed to serve its great purpose—the protection of the individual in his civil liberties."

The purpose of the Interstate Commerce Commission regulation in question is also important—the protection of life, limb and property on the highways of the nation so as not only to insure their safety but also to facilitate the free flow of commerce between the states.

The Court further stated (p. 100):

> "Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result."

Chief Judge Cardozo makes the same point in *People* v. *Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931), when he stated in reference to the validity of a criminal statute (p. 472):

> "Where two meanings are reasonable, the preference is given to the one that sustains a statute rather than to the one that overturns it."

A dramatic application of this principle occurred in *People* v. *Grogan*, 260 N. Y. 138, 183 N. E. 273 (1932) in which the Court upheld the constitutionality of a criminal prohibition against driving a motor vehicle so as to "unnecessarily interfere" with or "unnecessarily endanger" highway traffic. The Court could find no well-established meaning for the word "unnecessarily" in the context but nevertheless upheld the provisions by reinterpreting their language to provide an acceptable criterion. The Court said (p. 149):

> "Therefore, in order to render these two provisions of section 58 of the Vehicle and Traffic Law constitutional and provide for them a standard or measure of conduct, we must read the words 'unnecessarily interferes' or 'unnecessarily endangers' as 'unreasonably interferes' or 'unreasonably endangers,' which means 'interferes with or endangers the user of the highway through the failure to exercise reasonable care, reasonable caution or the reasonable foresight of a reasonably prudent and careful person.'"

Much less interpretation is required to uphold the regulation challenged herein. The District Court, in holding the instant regulation invalid in this case, for failing to afford an ascertainable standard of guilt, underestimated its capabilities when it said (90 F. Supp. at p. 999):

> "We are fully aware that the disaster which led to the present prosecution emphasized the need for adequate regulations, but it is not within our power to make them."

But it was not necessary in order to minimize the likelihood of the repetition of the Holland Tunnel disaster of which the Court was aware, that it make adequate regulations; it needed only to apply the interpretation of the existing regulation so as to accord it the normal presumption of constitutionality.

Apropos of this situation is the language of Chief Judge Cardozo, in *People* v. *Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931), when he said (p. 470):

> "The power existing, one is at a loss to imagine how the prohibited omissions could be more accurately stated, without a catalogue of particulars not susceptible of enumeration in advance of the event."

An adverse ruling from this Court would prevent the Interstate Commerce Commission from effectuating its clear Congressional mandate of prescribing and enforcing rules designed to insure the free and safe flow of interstate commerce, for a decision which would invalidate this regulation would also prevent the enforcement of any other. It is evident that the Interstate Commerce Commission cannot detail the specific routes throughout the United States that shall be used by carriers transporting dangerous cargo. In view of this, Chief Judge Cardozo's thought is compelling. Is it reasonable to suggest that whereas packaging, labeling, storing and handling may be regulated, this Court should confess that the transportation itself is beyond regulation?

Here two possible interpretations of the regulation are available: The first would be derived from judicial decisions interpreting analogous language and make criminal and unreasonable failure to recognize and select a commercially practicable route when such will enable a carrier of dangerous cargo to avoid a congested tunnel. The second interpretation, or rather the lack of one, would result in a throwing up of the hands acknowledging a failure to find meaning in the challenged language. Faced with these choices, of which the first yields a constitutional provision carrying out a clear and important Congressional purpose and the second strikes down such purpose on constitutional grounds, the first must be adopted.

Conclusion

Wherefore, we join in the Government's prayer that the decision of the Court of Appeals for the Third Circuit in sustaining Counts One, Three and Five of the Indictment be affirmed.

Respectfully submitted,

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